

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Petition on Behalf of the)
Louisiana Public Service)
Commission for Authority to)
Retain Existing Jurisdiction)
Over Commercial Mobile Radio)
Services Offered Within the)
State of Louisiana)

PR Docket No. 94-107

TO: The Commission

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REPLY COMMENTS OF BELL SOUTH CORPORATION
IN OPPOSITION TO LOUISIANA PUBLIC SERVICE
COMMISSION'S PETITION TO CONTINUE RATE REGULATION
OF COMMERCIAL MOBILE RADIO SERVICES

L. Andrew Tollin
Michael Deuel Sullivan
Michael A. Mandigo
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
202/783-4141

William B. Barfield .
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610
404/249-4445

Charles P. Featherstun
David G. Richards
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036
202/463-4132

Attorneys for BellSouth Corporation

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**REPLY COMMENTS OF BELL SOUTH CORPORATION
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OF COMMERCIAL MOBILE RADIO SERVICES**

BellSouth Corporation, on behalf of BellSouth Cellular Corp. ("BSCC") and Mobile Communications Corporation of America ("MCCA") (hereinafter referred to as "BellSouth"), files this reply to the comments of Radiofone, Inc. ("Radiofone") filed in the above-captioned proceeding.

In BellSouth's initial comments, BellSouth asserted that the petition filed by the Louisiana Public Service Commission ("LPSC") for authority to continue to regulate rates of commercial mobile radio service ("CMRS") providers in the State of Louisiana should be denied because it failed to demonstrate in any meaningful way that the market for CMRS services in Louisiana fails to protect consumers from unjust, unreasonable and discriminatory rates. 47 U.S.C. § 332.

BellSouth noted that the LPSC virtually ignored FCC Rules specifying the kind of evidence which would demonstrate market failure; and the material the LPSC did supply either lacked relevance to rate regulation or did not show market failure. Indeed, BellSouth asserted that the specific instances cited by the LPSC in support of its petition instead demonstrated why the LPSC should not be authorized to continue rate regulation.^{1/}

In addition to BellSouth's filing, fifteen parties filed comments in response to the LPSC petition.^{2/} The

¹ BellSouth attached to its comments an affidavit of Dr. Richard P. Rozek, an economist with National Economic Research Associates, Inc. ("NERA"), to demonstrate that cellular rates in regulated jurisdictions are generally higher than cellular rates in unregulated jurisdictions. His study found that regulation, especially pre-notification tariff regulation, raises consumer prices and impedes competition. Therefore, he concluded that the problems identified by the LPSC in its petition are actually caused by regulation and are not justification for continued regulation.

² The other commenting parties are AMSC Subsidiary Corporation ("AMSC"), AirTouch Paging ("AirTouch"), American Mobile Telecommunications Association ("AMTA"), Cellular Telecommunications Industry Association ("CTIA"), Century Cellunet, Inc. ("Century"), E.F. Johnson Co. ("E.F. Johnson"), GTE Service Corporation ("GTE"), McCaw Cellular Communications, Inc. ("McCaw"), Mercury Cellular telephone Company and Mobiltel ("Mercury"), Mobile Telecommunications Technologies Corp. ("Mtel"), National Cellular Resellers Association ("NCRA"), Nextel Communications, Inc. ("Nextel"), Paging Network, Inc. ("PageNet"), Personal Communications industry Association ("PCIA"), and Radiofone.

overwhelming majority of these comments assert that the LPSC has failed to meet its substantial burden of proof under Section 332 of the Communications Act to continue to regulate rates of CMRS providers.^{3/}

Only two commenters -- NCRA and Radiofone -- support the LPSC petition.^{4/} However, these comments merely echo the LPSC's unsupported and conclusory concerns. They contain no state-specific evidence demonstrating market failure in Louisiana so they add nothing probative to justify LPSC regulation. Therefore, BellSouth continues to assert that the LPSC petition should be denied.

³ See comments of AirTouch, AMTA, AMSC, BellSouth, CTIA, Century, E.F. Johnson, GTE, McCaw, Mercury, Mtel, Nextel, PageNet, and PCIA.

BellSouth, Century, CTIA, GTE, McCaw, Mercury and PCIA oppose the LPSC petition on all grounds.

AMTA, AMSC, AirTouch, E.F. Johnson, Mtel, and PageNet oppose the LPSC petition on more limited grounds that LPSC regulation should in no case be extended to non-cellular services. BellSouth agrees with these commenters that the LPSC has not even attempted to demonstrate that paging and other non-cellular services should be subject to state rate regulation. Nextel also opposes the LPSC petition on more limited grounds asserting that regulation should in no case be applied to non-dominant carriers. None of these parties assert that cellular services should be subject to continued LPSC rate regulation or that the LPSC has met its burden of proof under Section 332.

⁴ In this reply, BellSouth responds only to the comments of Radiofone. The NCRA comments regard the state of the cellular market nationwide and CTIA fully addresses and rebuts NCRA's generalized arguments. BellSouth therefore supports CTIA's comments on the NCRA position.

Radiofone advocates continued LPSC regulation but it adds no new evidence in support of the LPSC petition. It merely restates the cases and/or instances of past LPSC regulation the LPSC cited in its petition. BellSouth fully addressed these issues in its initial comments and, since Radiofone sheds no new light on those issues, it is unnecessary to restate BellSouth's arguments here. BellSouth has already shown that the cases and instances of past LPSC regulation cited by the LPSC do not demonstrate current market failure in Louisiana. BellSouth Comments at 12-29.^{5/}

More importantly, the arguments Radiofone makes later to "correct" LPSC "mis-statements" regarding cellular pricing in Louisiana squarely contradict, and hence undermine, its support for the LPSC. Radiofone explains that the LPSC improperly criticizes both the similarity and dissimilarity of cellular pricing in Louisiana. Radiofone notes that the LPSC alleges that when rates between two providers are different, the carriers must be dividing the market; when they are the same, the LPSC alleges that the carriers must be parallel pricing. Radiofone Comments at 5.

⁵ To the extent Radiofone merely repeats the criticism of BellSouth Mobility, Inc.'s (a BellSouth subsidiary) corporate rate plans and roaming charges, the source of such criticism must be considered in context. Radiofone is a competitor of BellSouth in a number of Louisiana markets.

Radiofone asserts that "the LPSC cannot have it both ways." It asserts that the "only correct conclusion from these observations about cellular pricing behavior is that the market is *competitive* and the carriers are logically responding to market forces as the Commission anticipated when it originally decided to promote competition by licensing two carriers in each market." *Id.* at 5-6 (emphasis added). BellSouth agrees entirely with Radiofone's assertion.

Indeed, Radiofone states that to the extent that rates are the same in Louisiana, they demonstrate not parallel pricing, but, "as might logically be expected, *vigorous competition*. As soon as one carrier changes its rates, the other responds competitively in order to ensure that it does not lose any customer." Radiofone Comments at 5 (emphasis added). It adds that "*competition, not conscious parallel pricing, is at work ... just as competition determines the cellular rates offered by competing providers.*" *Id.* (emphasis added). Radiofone's repeated pronouncements of the competitiveness of the Louisiana cellular market, while correct, entirely undermine its support for the LPSC petition that must, pursuant to Section 332 of the Act, show *current market failure* to justify continued rate regulation.

While Radiofone supports the LPSC petition to continue LPSC regulation, it (like BellSouth) strongly opposes the LPSC's extension of its rate authority to include any form of rate of return regulation. Radiofone Comments at 6-11. Its argument in opposition to the rate of return issue again squarely contradicts its support for the LPSC's current regulation. At one point, Radiofone agrees that minimal regulation of CMRS is in the public interest and supports the FCC's decision to forbear from applying Section 203 of the Act to CMRS providers. It states that tariff filing requirements impose needless costs on carriers and, ultimately, the public. *Id.* at 10. Yet, Radiofone supposedly supports the LPSC's petition that seeks to continue to regulate CMRS rates through the filing of state CMRS tariffs.^{6/} Radiofone cannot have it both ways. Radiofone is obviously trying to ingratiate itself to the LPSC by supporting the LPSC petition while opposing what the LPSC really wants to do.

Finally, Radiofone argues that federal preemption of state regulation of intrastate CMRS violates the Tenth

⁶ Of course, the FCC has found that tariff filings merely increase the chances of parallel pricing. See *Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-253, Second Report and Order, 9 FCC Rcd. 1411, 74 Rad. Reg. 2d (P&F), 835, 876 (1994), citing, *Competitive Carrier*, Sixth Report and Order, 99 FCC 2d 1020, 1029-30 (1985).

Amendment to the U.S. Constitution. Radiofone's argument is without merit. Radiofone cites no case authority to support its position, and for good reason. The Commerce Clause, U.S. CONST., Art. I, Sec. 8, cl. 3, gives Congress plenary power to regulate interstate commerce. Under the Supremacy Clause, state laws that conflict with federal regulation of commerce are preempted. U.S. CONST., Art. VI, cl. 2; see *Katzenbach v. McClung*, 379 U.S. 294 (1964). The Supreme Court has repeatedly held that the Tenth Amendment does not act as a limit on the exercise of Congressional authority under the Commerce Clause. *New York v. United States*, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). The Court has also made clear that Congressional power under the Commerce Clause may even extend to subjects that are wholly intrastate, as long as Congress has a rational basis for determining that interstate commerce is affected. *Fry v. United States*, 421 U.S. 542 (1975); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); see *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

It cannot be reasonably argued that there is no rational basis for the preemption of state rate and entry

regulation of CMRS providers, and Radiofone does not so maintain. The legislative history establishes, for example, that Congress found it necessary to preempt state regulation "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, 103d Cong. 1st Sess. 260 (May 25, 1993), reprinted in 1993 U.S.C.C.A.N. 587. Congress therefore intended "to establish a Federal regulatory framework to govern the offering of all commercial mobile services" in order to "promote competition and protect consumers." H.R. Rep. No. 103-213, 103d Cong. 1st Sess. 490-91 (Aug. 3, 1993), reprinted in 1993 U.S.C.C.A.N. 1179-80.

All CMRS services are by definition interconnected with the public switched network, see 47 U.S.C. § 332(d)(1)-(2), and it is well established that interconnection with the telephone network facilitates interstate communication and provides a basis for federal regulation. *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977). Moreover, all CMRS services involve the use of radio, which inherently affects

interstate commerce. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Indeed, in *NARUC v. FCC*, 525 F.2d 630, 646-47 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976), the Court held that in the absence of an explicit statutory reservation of state regulatory authority, federal regulation could preempt state regulation where necessary to "create the atmosphere of free entry and competition which the Commission has determined is desirable as a means of maximizing the development of mobile radio technology." Thus, there is no basis to Radiofone's position that Congress' preemption of state rate regulation is unconstitutional.

In conclusion, therefore, since the vast majority of the commenters oppose the LPSC petition and the few commenters that support the LPSC petition add nothing to cure its obvious deficiencies in light of the substantial burden of proof under Section 332 of the Act, BellSouth reasserts that the LPSC petition should be denied.

Respectfully submitted,

BELLSOUTH CORPORATION

By: L. Andrew Tollin
L. Andrew Tollin
Michael Deuel Sullivan
Michael A. Mandigo
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
202/783-4141

By: Jim O. Llewellyn
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610
404/249-4445

By: Charles P. Featherstun
Charles P. Featherstun
David G. Richards
1133 21st Street, N.W., Ste. 900
Washington, DC 20036
202/463-4132

Attorneys for BellSouth Corporation

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CERTIFICATE OF SERVICE

I, Josephine D. Rahme, hereby certify that on this 14th day of October 1994, copies of the foregoing "Reply Comments of BellSouth Corporation in Opposition to Louisiana Public Service Commission's Petition to Continue Rate Regulation of Commercial Mobile Radio Services" were served on the following:

Michael F. Altschul
Vice President, General Counsel
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, N.W, Suite 200
Washington, DC 20036

Yukio Naito, Chairman
Public Utilities Commission
State of Hawaii
465 South King Street
Kekuanaoa Building, #103
Honolulu, HI 96813

Rosalind Allen
Acting Chief, Land Mobile &
Microwave Division
Federal Communications Commission
2025 M Street, N.W., Room 5202E
Washington, DC 20554

Gina Harrison
Attorney, Land Mobile & Microwave
Division
Federal Communications Commission
2025 M Street, N.W., Room 5202E
Washington, DC 20554

Caressa D. Bennet, Regulatory Counsel
Rural Cellular Association
1831 Ontario Place, N.W., Ste. 200
Washington, D.C. 20009

Douglas B. McFadden
McFadden, Evans & Sill
1627 Eye Street, N.W., Ste. 810
Washington, D.C. 20006

Joel H. Levy
William B. Wilhelm, Jr.
Cohn and Marks
Suite 600
1333 New Hampshire Ave., NW
Washington, D.C. 20036

Ashton R. Hardy
Hardy and Carey, L.L.P.
111 Veterans Blvd, Ste. 255
Metairie, LA 70005

Leonard J. Kennedy
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Judith St. Ledger-Roty
James J. Freeman
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Thomas Gutierrez
J. Justin McClure
Lukas, McGowan, Nace
& Gutierrez, Chartered
1111 19th St., NW, Ste. 1200
Washington, D.C. 20036

Bruce D. Jacobs
Glenn S. Richards
Fisher, Wayland, Cooper, Leader
& Zaragoza, L.L.P.
2001 Pennsylvania Ave., NW, Ste. 400
Washington, D.C. 20006

Carl W. Northrop
Bryan Cave
700 13th Street, NW, Ste. 700
Washington, D.C. 20005

W. Bruce Hanks
Century Cellunet, Inc.
100 Century Park Drive
Monroe, LA 71203

Russell H. Fox
Gardner, Carton & Douglas
Suite 900, East Tower
1301 K St., N.W.
Washington, D.C. 20005

Howard J. Symons
Mintz, Levin, Cohn, Ferris, et al.
701 Pennsylvania Ave., NW Ste 900
Washington, D.C. 20004

Thomas G. Henning
Vice President-General Counsel
Mercury Cellular Telephone Co.
P. O. Box 167
Sulphur, LA 70664

Sinclair Crenshaw
Vice President
Mobicel, Inc.
P. O. Box 188
Larose, LA 70373

Mark J. Golden
Acting President
Personal Communications
Industry Association
1019 19th St., N.W., Ste. 1100
Washington, D.C. 20036

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez
1111 19th St., NW, Ste. 1200
Washington, D.C. 20036


Josephine D. Rahme